

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:
NATIONAL PRESCRIPTION
OPIATE LITIGATION

Case No. 1:17-md-2804
Cleveland, Ohio

CASE TRACK THREE

May 4, 2022
12:08 p.m.

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TRANSCRIPT OF FINAL PRETRIAL PROCEEDINGS,
BEFORE THE HONORABLE DAN A. POLSTER,
UNITED STATES DISTRICT JUDGE,

- - - - -

Official Court Reporter: Susan Trischan, RMR, CRR, FCRR, CRC
7-189 U.S. Court House
801 West Superior Avenue
Cleveland, Ohio 44113
216-357-7087
Susan_Trischan@ohnd.uscourts.gov

Proceedings recorded by mechanical stenography;
transcript produced by computer-aided transcription.

1 APPEARANCES:

2 For the Plaintiffs:

3 Peter H. Weinberger, Esq.
4 Spangenberg, Shibley & Liber
5 1001 Lakeside Avenue, Ste. 1700
6 1900 East Ninth Street
7 Cleveland, Ohio 44114
8 216-696-3232

9 W. Mark Lanier, Esq.
10 M. Michelle Carreras, Esq.
11 The Lanier Law Firm
12 6810 FM 1960 West
13 Houston, Texas 77069
14 813-659-5200

15 Frank L. Gallucci, III, Esq.
16 Plevin & Gallucci Company, LPA
17 The Illuminating Building
18 Suite 2222
19 55 Public Square
20 Cleveland, Ohio 44113
21 216-861-0804

22 Salvatore C. Badala, Esq.
23 Napoli Shkolnik
24 360 Lexington Ave., 11th Floor
25 New York, New York 10017
212-397-1000

Paulina do Amaral, Esq.
Michael Jay Fuller, Jr., Esq.
Alex Abston
Mildred Conroy
Belinda Lower
Jason Boyd
James Misocky

26 For Walgreen Defendants:

27 Jeffrey A. Hall, Esq.
28 Bartlit Beck LLP
29 54 West Hubbard Street, Ste.300
30 Chicago, Illinois 60654
31 312-494-4400

32 Katherine L.I. Hacker, Esq.
33 Bartlit Beck LLP
34 1801 Wewatta Street, 12th Floor
35 Denver, Colorado 80202
303-592-3100

Michael Freeman

APPEARANCES (CONTINUED) :

For CVS Defendants:

Eric R. Delinsky, Esq.
Paul B. Hynes, Jr., Esq.
Alexandra W. Miller, Esq.
Anthony M. Ruiz, Esq.
Zuckerman Spaeder - Washington
Suite 1000
1800 M Street, NW
Washington, DC 20036
202-778-1831

Mark Vernazza, Esq.

For Walmart Defendants:

John M. Majoras, Esq.
Kerri Ruttenberg, Esq.
Jones Day - Washington
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
202-879-3939

Tara A. Fumerton, Esq.
Tina M. Tabacchi, Esq.
Jones Day - Chicago
Suite 3500
77 West Wacker
Chicago, Illinois 60601
312-782-3939

ALSO PRESENT:

Special Master David Cohen

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1 WEDNESDAY, MAY 4, 2022, 12:08 P.M.

2 THE COURT: All right. Good afternoon,
3 everyone.

4 A whole lot of things have been filed. I'm
12:09:55 5 trying very hard to make this abatement hearing
6 intelligible. No Judge has ever done this. I had hoped
7 a whole lot more would have been agreed upon between
8 counsel. Maybe that was wishful thinking.

9 It would have been a lot more helpful to
12:10:17 10 me.

11 Candidly, it looks like I'll largely be
12 doing this on my own. I mean, you'll be presenting
13 whatever you're presenting. I'll be listening.

14 I'll end up doing, obviously, not what the
12:10:31 15 plaintiffs want me to do or not what the defendants want
16 me to do. And trust me, the way I'll write it, I'll make
17 it as clear as I can to the Court of Appeals that neither
18 side was particularly helpful, but we'll get through it.

19 So first, we've got to get some ground
12:10:53 20 rules for admissibility of expert reports.

21 A whole lot of stuff's been filed. I, you
22 know, I only want to do this once. I believe that for a
23 proceeding like this, I could just admit the expert
24 reports of both sides, but I don't want to run some risk
12:11:16 25 that someone on the Sixth Circuit will say I did

1 something wrong.

2 So I guess we'll just have to have, you
3 know, fairly short direct testimony from each of the
4 experts.

12:11:30 5 Everyone should presume that I have read
6 the reports. I've thought about them. But I don't -- I
7 mean, the defendants have objected to the admissibility.
8 Again, I think I could probably structure things and
9 overrule it, but I don't want to create
12:11:48 10 another -- another issue on appeal.

11 So unless the parties are in agreement, I
12 think that's what we'll just do. We'll have short direct
13 testimony by everyone. You'll have to use some of your
14 time for that. I'm not extending this hearing. So it
12:12:03 15 will shorten everyone's cross-examination. If that's how
16 you want to do it, so be it.

17 So does anyone have anything more they want
18 to say about that?

19 (No response).

12:12:18 20 Okay. Well, that's what we'll do then.

21 MR. WEINBERGER: Your Honor, maybe I'll
22 take the opportunity to ask a question for -- to make
23 sure that we understand what you're talking about when
24 you say a short direct testimony.

12:12:40 25 THE COURT: Well, enough to make your

1 record, Peter, because the defendants are objecting.

2 MR. WEINBERGER: Right.

3 THE COURT: I'm really not sure why they're
4 objecting, candidly. It benefits them, too, and they can
12:12:52 5 use more of their time on cross, but they've raised it.
6 So again, I don't -- you know, I don't want to create an
7 issue.

8 So you've got to put enough in so the
9 record's clear. You're making the record of what these
12:13:05 10 people are saying.

11 MR. WEINBERGER: Right.

12 So let me -- let me tell you what I'm
13 thinking, and then either the defendants or you could
14 react to it.

12:13:14 15 We put up expert, an expert. We have the
16 expert identify the expert report. We have the expert
17 testify that this is a true and accurate copy of his
18 report, that it contains the expert's credentials, that
19 it contains all of the expert's opinions, the methodology
12:13:48 20 used.

21 THE COURT: Well, I don't think
22 that that's -- they're objecting to that.

23 So there's no objection to credentials. I
24 mean, you know, these experts are testifying.

12:13:56 25 I think you've got to have them summarize

1 their conclusions. So you're making a record so there's
2 oral testimony on what their conclusions are.

3 You don't need to go through every
4 paragraph of the report. They can then refer to their
12:14:12 5 report for details, but you've got to get enough in there
6 so if the Court of Appeals wants to look and say, "Well,
7 I don't" -- you can say, "Here's what they said."

8 The defendants are going to have to do the
9 same thing. I think it's somewhat of a waste of time,
12:14:29 10 but it's the same ground rules for both.

11 I mean, the defendants are saying you can't
12 just have them say, "Yes, here's my report, I've thought
13 of it, I've thought of it, I worked on it," and then the
14 report becomes testimony.

12:14:48 15 They're saying you can't do that.

16 MR. LANIER: So they can -- Your Honor,
17 Mark Lanier here.

18 So they can just read the report out loud
19 as we ask them each opinion?

12:15:03 20 THE COURT: Yeah, right. They can
21 read -- they can read sections of their report, sure.

22 MR. LANIER: I'm with you, it seems like a
23 waste, but we'll do whatever we need to do.

24 THE COURT: Well, as I said, Mark, I
12:15:18 25 believe that I could -- you know, that there's ways

1 around that, that rule, but I don't think it -- no one
2 wants to do this twice.

3 MR. LANIER: Agreed.

4 Judge, I'm not questioning you. I'm -- I
12:15:32 5 find it -- I'm sure you find it twice as frustrating as I
6 do, but we'll do whatever needs to be done.

7 We'll make it work, Judge.

8 THE COURT: Just that basically they have
9 to give the, you know, essentially it's a summary and
12:15:49 10 their key findings and conclusions, they have to recite,
11 recite them orally.

12 MR. LANIER: Understood.

13 THE COURT: Okay. But no one has to go
14 through as if this were a jury. That would be insanity.
12:16:01 15 So that's what we'll do.

16 MR. LANIER: Okay.

17 THE COURT: All right. Now, the
18 scheduling, you know, the question is do we want to start
19 at 8:30 or do you want to start at 9:00? I don't really
12:16:18 20 care. I mean, my plan is to get, you know, six, seven
21 hours of testimony per day.

22 If we do more than that, everyone will just
23 get exhausted and that doesn't make any sense, but we
24 want to get through it.

12:16:33 25 I'm doing whatever else I need to do during

1 the noon hour.

2 I think there's one time I have to take a
3 plea or do something at 3:00 o'clock because of the
4 scheduling of that particular jail. I couldn't do it
12:16:45 5 during the noon hour.

6 But what, you know, you tell me what -- you
7 want to start at 9:00, that's fine. If you want to start
8 at 8:30, we can start at 8:30. I don't particularly want
9 to do it much earlier than that, but it's really up to
12:17:00 10 all of you.

11 MR. LANIER: Judge, I'll be bold and speak
12 out.

13 As an early bird, 8:30 sounds marvelous to
14 me and we'll be there ready to go, but I'm obviously -- I
12:17:16 15 don't care.

16 THE COURT: It's up to the defendants,
17 right. I mean, it's, you know, it's not a big deal to me
18 either way, but so plaintiffs say they're willing,
19 they're okay with 8:30.

12:17:25 20 What about the defendants?

21 MR. DELINSKY: Judge, could we take it on a
22 day-by-day basis?

23 THE REPORTER: Wait. Who's talking?
24 Who's talking? Oh, there you are. Okay.
25 Sorry, I see you Eric. Go ahead.

1 MR. DELINSKY: Nice to see you, Sue, by the
2 way.

3 Judge, could we take it day by day so, for
4 instance, we can start 8:30 on Tuesday, that's the first
12:17:45 5 day, and assuming my co-defendants don't have objections,
6 then we'll just see where we are each day?

7 THE COURT: Okay. Why don't we do this?

8 Who was that speaking? That was --

9 MR. DELINSKY: That was Eric, Your Honor.

12:17:55 10 THE COURT: All right, fine.

11 Eric, why don't we do this, we'll plan to
12 start at 8:30. If there's a particular reason or a
13 particular witness who can't do it until 9:00, then we'll
14 be at 9:00 that day.

12:18:08 15 And my feeling is we could do our best,
16 particularly since some of these people are out of town,
17 if we can go a little later and wrap up a witness at the
18 end of the day, we will.

19 So, I mean, rather than start someone and
12:18:22 20 go for half an hour, I probably won't do that. So just
21 we'll try and make it understandable to everyone.

22 So that's sort of how we will be a little
23 flexible at the end to try and complete witnesses, but
24 obviously sometimes we're not going to be able to.

12:18:38 25 I don't control the cross-examination.

1 All right. There's one day, May the 12th,
2 I have a Zoom meeting that's important from 9:00 to 10:00
3 so we're going to start at 10:00 o'clock on the 12th.

4 Now, I was uncertain, I'm hoping we're
12:19:02 5 going to be able to wrap up by Thursday, May 19th, but I
6 was a little unclear.

7 If we don't wrap up Thursday, May 19th, had
8 we agreed there would be no trial on the 20th and then we
9 would wrap up on the 23rd? Or was I the only one who had
12:19:21 10 that?

11 MR. MAJORAS: John Majoras, Your Honor.
12 Defendants agreed with that.

13 THE COURT: All right. So, John, you --

14 MR. WEINBERGER: That was because of a
12:19:30 15 conflict that you had, Your Honor, on the 19th?

16 THE COURT: Well, I thought I might go out
17 of town but I'm not -- I'm not going out of town.

18 MR. WEINBERGER: Well, then why don't we
19 use the 20th?

12:19:41 20 THE COURT: Well, it's okay with me. It's
21 okay with me. So we'll use the 20th if we need it.

22 All right. If we wrap up, we'll wrap up.
23 Again, we're not going to have closing arguments. We'll
24 just have post-hearing briefs.

12:19:58 25 So we'll have the 20th, if needed.

1 We should be able to wrap up on the 20th,
2 but I'm not -- I've not scheduled anything critical on
3 the 23rd, Monday, the 23rd. If we need it, we need it.

4 All right. We've got the maximum of 25
12:20:21 5 hours of direct and cross for each side. I'll keep the
6 record. I think I allowed a 30-minute introductory
7 statement to each side, which we can have. You
8 don't -- I mean, candidly, I don't know if we need it,
9 but I'll allow that.

12:20:52 10 All right. Mask protocol, I think it's
11 still a good idea for everyone to wear a mask except when
12 speaking. And, of course, the witness takes off his or
13 her mask while testifying. I think that's a wise idea,
14 unless someone has a strong objection to that.

12:21:13 15 I think we should -- basically that's what
16 we did for phase one. I think we should do it for phase
17 two.

18 Anyone have any strong objection to that?

19 MR. LANIER: Your Honor, in phase one you
12:21:25 20 did allow us at counsel table, I think, to take them off
21 if we're comfortable being the proper distance from each
22 other, as long as the counsel tables are kept separate.

23 I don't remember if that's the way it was
24 or if that was just my dream that it was that way.

12:21:43 25 MR. WEINBERGER: We all wore masks.

1 MR. LANIER: Oh, we did?

2 THE COURT: I think everyone, everyone wore
3 a mask.

4 I wore a shield because I wanted people to
12:21:52 5 see my face, and I wasn't near everyone.

6 My recollection is that, unless you were
7 conducting an examination from counsel table, and you
8 generally didn't, I think most people did the lectern.

9 MR. LANIER: I probably didn't remember
12:22:06 10 right because of oxygen deprivation, but I will certainly
11 follow your rules and will do that.

12 THE COURT: Well, I think it's better to do
13 that.

14 MR. WEINBERGER: Mark didn't realize that I
12:22:19 15 got my second booster so.

16 THE COURT: Well, I -- you know, many of us
17 are -- well, everyone's younger than I am, but we're
18 not -- no one's real young. I just think it makes sense,
19 so that's what we'll do, we'll do the same thing.

12:22:34 20 All right. Defendants filed two objections
21 late yesterday or early in the morning.

22 I have looked at them. I think we can try
23 to address them now. It's the last time we're going to
24 have any hearing, and I think people need to know what --
12:23:01 25 what is going on.

1 The first one had to do with -- something
2 to do with Fraser. There was an issue with her
3 testimony, and I don't --

4 MS. MILLER: Judge Polster, Sasha Miller
12:23:28 5 for CVS.

6 That was filed on behalf of the defendants.
7 I'm happy to take you through the filing.

8 THE COURT: I mean, my feeling is if you
9 think this is new, then I'll direct her to be deposed
10 between now and when her testimony is.

11 I mean, I want to -- I mean, if -- I mean,
12 I think, quite frankly, it's crazy to have her on without
13 either side being free to ask her about, you know, the
14 proposals for things in her county, whether it makes
15 sense, whether they've done it before, what their
12:24:02 16 experience has been.

17 I mean, what the heck, if she's not doing
18 that, I'm not sure what the value of her testimony is.

19 MS. MILLER: Well, Your Honor, what we were
12:24:15 20 focused on in the motion is that she was going
21 to -- she's been disclosed as giving testimony about the
22 gaps between what they're doing in the county and what
23 Dr. Alexander and plaintiffs' abatement plan have
24 proposed.

12:24:33 25 And there's a history here, Your Honor.

We sought their -- we sought Ms. Fraser's deposition in advance of the abatement phase, specifically on the topic of plaintiffs' abatement plan, and plaintiffs objected to that and said Ms. Fraser will not be offering testimony on plaintiffs' abatement plan.

THE COURT: Well, what is she testifying to? The only issue in this trial is -- is the abatement plan.

MS. MILLER: Well, the initial disclosure, Your Honor, was about the programs in the county, but it was only subsequent to her deposition that plaintiffs, in filing their witness disclosure, stated she would be testifying, offering testimony, about the gaps between the programs in the county.

THE COURT: Ms. Miller, Ms. Miller, gaps in the county are not relevant to this hearing.

MR. WEINBERGER: Your Honor.

THE COURT: The only thing -- the only thing that's relevant is what, if any -- what, if any, programs, whatever, that I'm going to order as proper abatement for the nuisance that the jury found the defendants responsible for.

So that's -- I mean, anyone who's not testifying about that, I'm just going to say it's irrelevant, we don't need that witness.

1 So I don't want Ms. Fraser to talk about
2 generally what goes on in her county.

3 I mean, the only thing that's relevant is
4 what -- I mean, if she wants to say, "Look, this is what
12:26:11 5 we're doing now to try and help people who have Opioid
6 Use Disorder or, you know, suffering from the effects of
7 the opioid epidemic, this is what we're doing now and
8 this is how much it costs and this is what we need to do
9 if we had the money," I mean --

12:26:35 10 MR. WEINBERGER: Your Honor.

11 THE COURT: I mean, what else is she going
12 to testify to?

13 MR. WEINBERGER: Your Honor, Pete
14 Weinberger.

12:26:43 15 At Page 43 of her deposition that was taken
16 by Ms. Miller, she was asked the following question,
17 Ms. Fraser:

18 "So there is some overlap between the
19 services and the programs that are currently offered in
12:26:59 20 Lake County and those that are contained in the proposed
21 abatement plan, is that right?

22 "Answer: Yes. But the current services
23 and supports don't go as far, are not as comprehensive
24 and are not as holistic in the approach as is outlined in
12:27:22 25 the abatement plan."

1 At no --

2 MS. MILLER: And then -- oh, I'm sorry,
3 Pete.

4 THE COURT: Well, look, the only value of
12:27:31 5 her testimony is her firsthand knowledge and experience
6 of what Lake County is doing and why they're doing it,
7 and if she thinks that there are things which they would
8 do if they didn't have the money, she can talk about
9 that. And then the defendants can cross-examine her.

12:27:53 10 And, you know, if you point out, "Well,
11 guess what, you really do have the money and you're not
12 doing this, or this isn't effective" or whatever, and,
13 you know, if Alexander has said, "Lake County should do
14 X, Y and Z," and Fraser says, "Well, we tried Y and Z and
12:28:10 15 it's not effective," she has firsthand knowledge. All
16 right?

17 She's not an expert. She's a fact witness.
18 And both sides should be free to question her about her
19 actual knowledge what Lake County has been doing, what
12:28:27 20 they'd like to be doing, and how that fits in with what
21 either the plaintiffs have proposed or what the
22 defendants think are necessary.

23 So I mean, I don't -- I do not understand
24 the defendants' objection, but if you think you were
12:28:43 25 misled and you need to depose her, do a quick deposition,

1 an hour or two, you can do it.

2 MS. MILLER: Thank you, Your Honor.

3 We appreciate that.

4 THE COURT: I mean, otherwise there's no
12:28:56 5 relevance to her testimony, Ms. Miller, unless it's tied
6 to what the plaintiffs are proposing or the defendants
7 are proposing.

8 MS. MILLER: And, Your Honor, the basis for
9 the motion was that I asked Ms. Fraser questions
12:29:12 10 specifically about the differential between the programs
11 currently offered by the county and Alexander's abatement
12 plan, and she testified clearly, "I've not done any
13 evaluation like that or analysis."

14 And subsequently in their witness
12:29:29 15 disclosures, plaintiffs stated that she would be
16 testifying on that topic.

17 And so we were -- we did not have the
18 opportunity to fully depose her.

19 THE COURT: All right. If you -- if
12:29:38 20 you -- I mean, you know, you can -- you can take a two
21 hour, up to two hours and depose her just on that. You
22 know, she's -- you can ask her point blank, all right,
23 "What are you going to say about Alexander's plan?"

24 And she'll say it, and then you can
12:29:54 25 cross-examine her, and you'll know exactly what she's

1 going to say.

2 I don't know what she's going to say, but
3 presumably she's looked at it and she's got to be in a
4 position to say -- all right, if she says, "Look, we
12:30:06 5 don't need this in Lake County," well, that's going to be
6 a lot more conclusive to me than what some expert says.

7 She's there.

8 MS. MILLER: Thank you, Your Honor.

9 THE COURT: If she says, "We need it" and
12:30:19 10 why, well, I think that's probative. Now you can
11 cross-examine her on it. What the heck, she's the person
12 there responsible for providing the services in Lake
13 County; not some expert who's opining on what he or she
14 thinks Lake County needs.

12:30:33 15 All right. That takes care of her.

16 Now, we --

17 MS. FUMERTON: Judge Polster.

18 THE COURT: Yes.

19 MS. FUMERTON: This is Tara Fumerton on
12:30:42 20 behalf of Walmart.

21 In the motion, we actually referenced that
22 the same arguments apply to the Trumbull County
23 representative April Caraway.

24 She was asked the exact same line of
12:30:51 25 questions and responded similarly that she had not taken

1 any analysis to determine -- compare essentially what
2 Dr. Alexander is proposing and what the county is
3 currently doing.

4 So we would ask that the same ruling apply
12:31:06 5 to Ms. Caraway.

6 THE COURT: I don't quite understand why
7 these witnesses would have said that or what -- I mean,
8 that's the whole point of having their testimony, to say,
9 "Look, this is -- this is the problem in my county, this
12:31:25 10 is -- we have X amount of money and this is how we're
11 spending it, and if we had -- if we had more money, these
12 are the things we need to do which we're not able to do
13 now."

14 What -- I mean, nothing else would be
12:31:38 15 relevant to this hearing. So I don't quite understand
16 how anyone -- why the plaintiffs didn't make that clear
17 and why the defendants thought that these witnesses were
18 doing anything else.

19 I mean, if they're not doing that, what
12:31:56 20 would be the relevance of their testimony?

21 MR. WEINBERGER: Your Honor, both of these
22 witnesses were subjected to 14 hours of deposition before
23 we tried the case, and another -- I can't
24 remember -- hour-and-a-half of deposition.

12:32:10 25 And they were asked, Your Honor, if they

1 didn't -- if they weren't asked questions about how they
2 felt their current programs were inadequate, or the
3 defendants didn't get a full picture of that, that's the
4 defendants' problem, not ours.

12:32:24 5 What the defendants are --

6 THE COURT: Look, I'm -- they want
7 two -- they want two hours and it's got to be focused,
8 you know, point -- very specifically as to, you know, as
9 to what they think about Alexander's proposal, why they
10 think it's needed or why it's not.

11 Okay? That's it. And no wandering around.
12 So that's for Fraser, and who was the other
13 witness?

14 MS. FUMERTON: Your Honor, April Caraway.

12:32:58 15 THE COURT: Caraway. All right.

16 All right. Now, the other -- the
17 defendants are claiming that Keyes and Alexander are new
18 opinions, not rebuttal.

19 I mean, I'm going to let them testify to
12:33:23 20 whatever they want, okay? You can cross-examine them.
21 All right? I don't -- I have neither the time nor the
22 inclination to wade through and determine if there's
23 anything new.

24 All right?

12:33:35 25 I assume the plaintiffs are saying they are

1 specifically rebutting to something the defendants are
2 saying. Right?

3 MR. WEINBERGER: Correct.

4 MR. LANIER: Correct.

12:33:45 5 THE COURT: Well, they're allowed to do
6 that. That's what a rebuttal -- what a rebuttal report
7 is.

8 What -- what are the defendants claiming
9 that these two people are saying that's brand new, that's
12:34:01 10 unrelated to what they said before as opposed to saying,
11 "All right, you know, I gave you my first report; defense
12 expert says X, Y and Z and here's what I'm saying"?

13 MR. DELINSKY: So, Your Honor, to take
14 Caleb Alexander as an example, it's a short supplement,
12:34:21 15 it's two paragraphs, but in the second paragraph the
16 plaintiffs employed a new statistical analysis based on a
17 model that Dr. Alexander's -- the company he owns has
18 created and run. That model hadn't been used in this
19 case previously, to my knowledge. It had been used in
12:34:37 20 other cases such as in the Washington State case.

21 But more importantly, regardless of what
22 model he uses, it provides new statistical
23 analysis/analyses about how long it takes for users of
24 opioids, including prescription opioids, to get to the
12:35:01 25 point of an overdose, that I don't believe responds to

1 anything in -- any point made in our experts', certainly
2 doesn't respond to any apportionment point we make.

3 MR. WEINBERGER: Judge.

4 THE COURT: Well, I'm assuming it does. If
12:35:20 5 it doesn't, I won't allow it.

6 MR. WEINBERGER: Let me explain. Let me
7 explain how it does, Your Honor.

8 THE COURT: All right.

9 MR. WEINBERGER: So the defendants, the
12:35:28 10 defendants have multiple experts saying that their
11 contribution to the opioid epidemic ended when the volume
12 of pills that they were dispensing decreased after 2013,
13 '14 or '15.

14 In response to that, this report which
12:35:44 15 takes into account a 2022 study that was done, a modeling
16 that was done by Dr. Alexander published in the journal
17 "Addiction" makes the point that people that were
18 dispensed pills, prescribed and dispensed prescription
19 opioid pills in 2011, continue to make up a significant
12:36:08 20 portion of those patients who are addicted and require
21 treatment in 2019.

22 So that is in direct response.

23 THE COURT: All right. That sounds to me
24 as proper rebuttal. That's response so I'm overruling
12:36:22 25 that objection.

1 Now, what -- what -- what's the issue with
2 Dr. Keyes that you think is brand new and that's not
3 responding to something one of the defendants' experts
4 say?

12:36:42 5 MR. HYNES: Your Honor, Paul Hynes for CVS.

6 I think one issue we had -- and it applies
7 to both experts -- is that in the conference with Special
8 Master Cohen that preceded the trial order, we understood
9 that these rebuttal reports would be limited to
12:36:55 10 apportionment and in responding to the defendants'
11 apportionment experts.

12 And Dr. Keyes' report, for example, does
13 not deal with apportionment, but goes back into her
14 gateway theories which were the subject of her
12:37:09 15 track -- of her phase one testimony.

16 MR. WEINBERGER: No, that's not -- A,
17 that's not true. It wasn't limited.

18 And second of all --

19 THE COURT: Whether it's limited or not,
12:37:18 20 the issue is whether her supplemental report is
21 responding to something that one of the experts, one of
22 the defense experts says about what she said.

23 MR. WEINBERGER: Yes.

24 THE COURT: So it's rebuttal.

12:37:29 25 If it's not, it's not. Pretty simple.

1 MR. WEINBERGER: It is.

2 Two things, Your Honor.

3 First part of the report addresses multiple
4 defense experts' theory that gateway, the gateway theory,
12:37:44 5 you know, prescription opioids leading to heroin and
6 Fentanyl, is either not valid or is not of the high
7 percentage, 80 percent, that Dr. Keyes testified to in
8 her direct in the phase two -- phase one trial, excuse
9 me, Your Honor.

12:38:04 10 And that it also addresses the issue of
11 whether she is overcalculating the number of people who
12 likely have OUD in Lake and Trumbull County based upon a
13 statistical study that they say she should be relying on.

14 She answers that, that that statistical
12:38:29 15 study undercounts. That's number one. That's her first
16 area of rebuttal.

17 And the second portion of her report
18 directly rebuts the concept raised in the defense expert
19 reports that the harm can be apportioned among the
12:38:47 20 various players that contributed to the opioid epidemic,
21 and she opines it cannot be apportioned and gives the
22 reasons for that.

23 THE COURT: All right. Well, that's fine.
24 It sounds like it's proper rebuttal, so I'm overruling
12:39:01 25 that objection.

1 All right. So again, this is, you know,
2 this is what I'm going to have to decide and I want
3 everyone to focus on these issues. All right?

4 You know, scope of abatement by category.
12:39:27 5 What services or programs for Lake County and Trumbull,
6 Trumbull County are properly considered abatement for the
7 public nuisance the jury found?

8 So that's one.

9 Then obviously with that, some estimate of
12:39:44 10 the costs for each category.

11 Then, you know, for how many years should
12 an abatement plan go.

13 I mean, the experts run things out for 15
14 years. I think at some point some of the defendants or
12:40:06 15 defendants' experts are saying the Court shouldn't do
16 anything for more than one year.

17 I think the plaintiffs are
18 suggesting -- seem to be suggesting, well, we have a
19 five-year plan, and at the end of the five years, the
12:40:19 20 parties can come back in front of the Court and give an
21 assessment, and then the Court makes some decision as to
22 is something further needed, and if so, what.

23 That's about as far out as people
24 reasonably can predict, and no one can really determine
12:40:36 25 with any reasonable degree of certainty what's going to

1 happen in 15 years.

2 Then the issue of, you know, whether -- is
3 it possible to apportion whatever I order among these
4 three defendants, or should it just be one-third,
12:41:01 5 one-third, one-third?

6 And somewhat related to that is is
7 there -- is it, can the defendants demonstrate that
8 there's a rational basis to allocate some portion of
9 whatever I order to one or more other responsible parties
12:41:25 10 or groups of parties?

11 Then should the money be paid directly to
12 the county or do we have to create some, some structure,
13 some Special Master, some entity to receive the money and
14 then distribute it to the county? The problem is if we
12:41:52 15 do that, the defendants are going to have to pay for it.
16 So if the defendants are pushing for it, you know, you're
17 going to have to pay for it, obviously.

18 I've been thinking, you know, of just, say
19 hypothetically, I have a five-year plan of having the
12:42:12 20 money be distributed annually, and require each county to
21 certify in advance that they are only going to spend this
22 money on the following categories of programs or
23 services, and to certify at the end of the year that
24 that's what they've done.

12:42:31 25 And, you know, if there's a county

1 executive, then he or she would do it. That's what we
2 have in Cuyahoga County. I really didn't check to see
3 what Lake and Trumbull have, if they have commissioners
4 or an executive, but, I mean, have a certification like
12:42:49 5 that.

6 And that way, I think if it's done
7 annually, that's the way to do it.

8 I don't think it's a good idea to hand the
9 county five years of -- five years of payments. I'm not
12:43:03 10 going to suggest that. I'm not worried about these
11 defendants going out of business in the years two, three,
12 four or five, so I'm suggesting that. But again if we
13 have to create some entity to oversee it, we would need
14 that.

12:43:18 15 You know, injunctive relief, I'm going to
16 have to determine that. I've already told the parties
17 what my inclination is, and it has to do with each
18 defendant certifying that they have in place a system
19 that accomplishes certain things. And if they don't,
12:43:40 20 they'll put it in place.

21 But so those are the things that, you know,
22 that I'll want testimony on and I'll have to decide
23 whenever I make my decision.

24 So I think that covers what I have.

12:44:11 25 Special Master Cohen, did I leave out

1 anything essential that I should have addressed?

2 SPECIAL MASTER COHEN: On my list, Judge, I
3 don't see any gaps.

4 THE COURT: All right. Well, from the
12:44:30 5 defendants -- why don't we start from the plaintiffs'
6 side?

7 Anything that -- anything else that you
8 think we should address now?

9 MR. WEINBERGER: Your Honor, one -- one of
12:44:41 10 the issues that's been briefed that may take some time in
11 terms of testimony is the issue of -- I'll call it
12 generally speaking -- the collateral source tool, and
13 whether the defendants can -- this is -- we're setting
14 aside the issue of settlements and monies that the
12:45:12 15 counties may have received, for example, from the
16 national settlement.

17 I'm not talking about those set-offs, which
18 were -- we understand will occur, and we have no
19 particular issue with that.

12:45:24 20 But there appears to be an attempt here,
21 looking at the defense expert reports, to have the Court
22 consider third party sources of funding, grants, programs
23 paid by tax dollars, all of which --

24 THE COURT: Yeah, well, I'm not -- I'm -- I
12:45:49 25 see no reason to get into that.

1 I mean, I'll -- whatever, you know, the
2 point is what, what do these counties need to spend, all
3 right, over the next several years on what is -- what I
4 determine is properly considered abatement of the
5 nuisance found by the jury?

12:46:11

6 And again, I know the defendants are
7 somehow arguing that the only thing that can be abated is
8 the drugs themselves, so I either prevent the defendants
9 from selling opioids, dispensing opioids, or I do
10 nothing.

12:46:32

11 Well, I've told the parties I'm
12 categorically rejecting that.

13 First, I have no intention of prohibiting
14 the defendants from dispensing opioids. I think that
15 probably would be illegal, and I can't imagine any court
16 upholding that, and I can't imagine -- under no
17 circumstances would I do it.

12:46:45

18 So the issue is the nuisance that the jury
19 found was the impact, the effect. I mean, that
20 was -- that was -- the harm was the fact that they
21 accepted in some respects the gateway theory that people
22 became -- became addicted and developed Opioid Use
23 Disorder as a result of the defendants' conduct.

12:47:02

24 And everyone knows that has, you have
25 to -- you have to help those people.

12:47:21

1 So that's the nuisance. The nuisance and
2 the impact on the county is that they have lots of
3 residents who are living there and need help if they're
4 going to be productive citizens of that county.

12:47:37 5 And if not, they are a nuisance because,
6 you know, they could die, they can commit crimes, they
7 can be, you know, homeless. I mean, that's -- you know,
8 that's the nuisance.

9 It's not so much the drugs themselves; it's
12:47:53 10 the fact that people ingest the drugs, so the drugs
11 become the people who, in a nutshell -- the drugs aren't
12 just sitting around. If the drugs were just in the
13 pharmacy, there's no nuisance for any drug in a pharmacy.
14 The nuisance is only when there's overuse and diversion,
12:48:16 15 and people get addicted or dependent.

16 And then they, the people themselves,
17 become the nuisance. I don't know if I ever clearly said
18 that. I mean, that's -- so the nuisance is the
19 people -- is the people who, without help, are a huge
12:48:32 20 problem for the counties.

21 So I'm not going to -- I'm not going to
22 worry about insurance or grants. Obviously tax dollars,
23 that's where it's coming from, so the question -- so
24 that's what -- that's what any -- anything I order the
12:48:50 25 defendants to pay, it's going to address that.

1 So I'm -- I'm not inclined to consider
2 those things.

3 MR. DELINSKY: But, Your Honor, if I may
4 for one second.

12:49:00 5 Number one, CVS has not had an opportunity
6 to brief this issue. Plaintiffs included it in their
7 trial brief. That was the first time, and this is a very
8 significant issue that will require substantial briefing.

9 Number two, what we're talking about meets
12:49:14 10 exactly what you're saying, Your Honor. In other words,
11 if you were to determine that it is appropriate
12 abatement -- of course, over defendants' objection -- to
13 provide for treatment, treatment dollars for residents of
14 the counties to help address their Opioid Use Disorder,
12:49:33 15 the point we'd be making is some portion, some
16 significant portion of that treatment already is
17 available, whether it's from Medicare, Medicaid, private
18 insurance.

19 There's any number of ways that that's
12:49:48 20 available, and it's a significant funding source.

21 Third, Your Honor, you addressed this
22 issue. I know there's been so many orders, and I hope --
23 I may not get it quite right, but you addressed this
24 issue in a *Daubert* motion in Track 1 regarding --
12:50:06 25 actually it was a *Daubert* motion against Dr. Alexander.

1 And what you -- I'm paraphrasing, Judge, so
2 I really don't mean to put words in your mouth -- but
3 what I read your opinion to state back then, I think this
4 was in August or September of '19, was that you would
12:50:24 5 consider this at trial, you'd hear evidence of these
6 other funding sources and how it works, and because it's
7 a Court of equity you would determine the degree to which
8 that impacts the needs of the community.

9 That's the right way to proceed here,
12:50:39 10 exactly as the Court outlined, that Your Honor will hear
11 evidence from our witnesses of the degree to which
12 Medicaid will provide for addiction treatment if the
13 patients can be reached, the degree to which private
14 insurance does and will continue to, and then Your Honor
12:50:54 15 will have the information.

16 Defendants simultaneously will have had
17 their opportunity to make their record in the event Your
18 Honor does not accept our position. We can brief it in
19 post-trial briefing so that we have an opportunity, CVS
12:51:06 20 at least, to lay out our legal arguments as to why you
21 should consider it.

22 So that's what I propose is the correct way
23 forward.

24 THE COURT: Well, if you want to spend your
12:51:17 25 time putting in, you know, witnesses who talk about

1 Medicare and Medicaid, fine; private insurance.

2 But I, you know, and I don't think there's
3 anything in the law that suggests that defendants get a
4 windfall or something if they -- if someone thinks that
12:51:41 5 Medicaid, that Medicaid may fund something.

6 Who knows what Medicaid's going to continue
7 to do. All right?

8 MR. DELINSKY: Your Honor, you --

9 THE COURT: Some of these people
12:51:54 10 have -- well, most of them have -- the insurance is
11 Medicaid. Presumably the county's not -- the county's
12 not providing money, double funding people who have
13 private insurance.

14 So I mean, if you want to spend your
12:52:15 15 limited hours on that, I can't prevent you from doing it.
16 Whether I'll -- you know, I'm telling you I may or may
17 not even consider it, but if -- it's your 24 hours,
18 Mr. Delinsky, so --

19 MR. DELINSKY: All right. Well, thank you,
12:52:30 20 Your Honor.

21 THE COURT: -- if you want to put it in,
22 put it in.

23 MR. DELINSKY: Thank you, Your Honor.

24 And I believe it's 25. I just want to make
12:52:36 25 sure you're not docking me an hour.

1 THE COURT: Oh, I think I said 25.

2 MR. DELINSKY: Okay. Your Honor, just one
3 point and, look, we can move past this, but in your
4 order, the one I was referring to, Your Honor did devote
12:52:49 5 some sentences to explaining the following principle:
6 That the remedy of abatement is not a remedy of
7 punishment. It is -- it is a remedy to figure out what
8 needs to be done to abate the nuisance.

9 And, of course, there's disagreements about
12:53:04 10 what that is, but putting those disagreements aside, I
11 think the point Your Honor was driving at in that moment
12 was that really what we're looking at, unlike a
13 negligence case or an intentional tort, really what we're
14 looking at here is what is needed to address the nuisance
12:53:25 15 that exists in the community.

16 And if that funding comes from someplace
17 else, then it may not -- you know, the funding that is
18 needed to address it is different. And we don't think of
19 windfalls, we don't think of the concepts that may be in
12:53:39 20 play in a negligence suit or an intentional tort because
21 the remedy here is equitable, and it's exclusively to
22 abate a nuisance and not to punish.

23 So, Your Honor, we don't have to -- there
24 will be briefing on this. It's a significant issue. I
12:53:54 25 appreciate the opportunity for us to make our record.

1 THE COURT: Okay. But the point is if
2 you're making that argument, you have to then agree that
3 if for some reason, if for some reason, though, that
4 funding changes or ceases to be available, the defendants
12:54:08 5 are conceding they've got to pick it up.

6 MR. DELINSKY: That's an issue we very well
7 will discuss and will be --

8 THE COURT: Well, if you're not willing to
9 do that, then you're wasting your time even raising it,
12:54:20 10 Mr. Delinsky. All right? I mean, because you're
11 undercutting your own argument.

12 You're saying, "All right, these things
13 need to be done, but they're already being done and being
14 paid for by X, Y and Z and the counties don't need the
12:54:36 15 money," okay, but then you've got to concede that if that
16 changes over years two, three and four, then the
17 defendants will pay it.

18 If you're not willing to do that, I think
19 you're wasting your time. You're wasting some of your 25
12:54:50 20 hours.

21 MR. DELINSKY: Your Honor.

22 THE COURT: And no Court of Appeals would,
23 I don't think.

24 MR. DELINSKY: Your Honor, the proposal
12:54:58 25 that CVS has put in addresses that issue and would

1 provide for that flexibility, mindful, of course, Judge,
2 any time we talk about treatment, okay, and we talk about
3 the effects of the nuisance, I just feel compelled to say
4 we object to taking the remedy that far, but subject to
12:55:14 5 that objection, we have provided that.

6 THE COURT: You may object to it, but as I
7 said, the nuisance, the nuisance is the people, and
8 what -- and the burden that they're placing upon the
9 county.

12:55:33 10 Again, to say that, "All we have to do is
11 abate the drugs," fine, if you -- you know, "And all a
12 Court can do is prevent the defendants from dispensing
13 opioids," you give that argument, but I don't -- I mean,
14 it's going to fall on deaf ears for me. And I can't
12:55:53 15 imagine any Court of Appeals would think you were being
16 serious, for the nuisance has got to be the people who
17 have ingested the drugs and are a big problem because
18 they've got -- they are addicted or dependent.

19 That is the nuisance that the counties have
12:56:09 20 to deal with, and that's what I'm going to come up with a
21 plan to abate.

22 And I can't say it any clearer. I may have
23 never said it that clearly, but I think that's what it
24 is. So we should focus, should focus on that.

12:56:30 25 MR. WEINBERGER: Your Honor, can I address

1 my friend Mr. Delinsky's comments for just a moment?

2 THE COURT: Okay.

3 MR. WEINBERGER: Not to belabor it.

4 So it's interesting that he references

12:56:43 5 either a negligence or an intentional tort case.

6 Well, in this case the jury found that the

7 defendants acted intentionally and illegally, and to

8 suggest that they get a windfall from funding in the

9 future that is uncertain and unclear, you know, runs

12:57:05 10 contrary to every aspect of collateral source -- of the

11 collateral source rule.

12 And, in fact, just recently Judge Breyer in

13 San Francisco ruled exactly that way, that the evidence

14 of collateral sources by way of funding or by way of tax

12:57:24 15 dollars does not come into evidence.

16 Now, the defendants, what you've said to

17 the defendants is, well, they can use their time to

18 present this evidence.

19 Well, if they have -- if they're going to

12:57:38 20 use their time to present this evidence because you're

21 ruling you'll at least hear it, then we have to spend

22 time to cross-examine those issues.

23 And so, for example, we have to go through

24 our grants, grant applications where the grant

12:57:52 25 applications clearly say that you have to certify that

1 there are not other sources of funding before you can get
2 those grants, or where Medicaid and coverage for Opioid
3 Use Disorder is dependent upon future legislation,
4 regulations and whether or not the State of Ohio
12:58:11 5 continues to opt into the Medicaid --

6 THE COURT: Medicaid expansion, that's
7 right.

8 Okay, fine, but I know -- I know that.
9 Okay? You don't need to put witnesses on. Everyone
12:58:23 10 knows that, that it's just fortunate that Ohio opted in.

11 But any -- and it was not done by an act of
12 the legislature. It was the control Board, that Governor
13 Kasich managed to do an end run around the legislature
14 and Governor DeWine has continued it, but we have an
12:58:44 15 election. You know, presumably Governor DeWine will
16 continue, but he doesn't have to.

17 The point is so it's all conjecture, so
18 again I don't -- I don't think it's particularly
19 probative, but, I mean, those are the facts. The facts
12:59:04 20 aren't in dispute that right now we have Medicaid
21 expansion. It might continue.

22 Grants, I don't think anyone should
23 spend -- I mean, you know, you may get a grant, you may
24 not, okay, so but again, I don't think anyone should
12:59:19 25 spend a great deal of time on it, but I can't prevent the

1 defendants from, if they want to put it in, they want to
2 submit a lot of briefs, fine. But I'm not -- I
3 think -- I believe Judge Breyer was right, but I'll have
4 to make -- make my own independent decision.

12:59:40 5 MR. WEINBERGER: That's all I have for the
6 plaintiffs, Your Honor.

7 THE COURT: Okay. Anything -- anything
8 from the defendants, anything else from the defendants?

9 MR. HALL: Your Honor, Jeff Hall for
12:59:53 10 Walgreens.

11 One question about setup.

12 Would the courtroom be available Monday for
13 the tech people to spend a little time inside to make
14 sure it's --

13:00:03 15 THE COURT: I think so. I know that the
16 Court Connect people are going to be in tomorrow
17 afternoon.

18 Who was that speaking? I'm sorry.

19 MR. HALL: Jeff Hall for Walgreens, Your
13:00:13 20 Honor.

21 THE COURT: Oh, sorry, Jeff.

22 I believe from 1:00 to 3:00 tomorrow the
23 Court Connect people and IT are going to be in the
24 courtroom.

13:00:23 25 That might be a good time, you know, anyone

1 else who wants -- I mean, that's the time to check out to
2 make sure everything's working that should be working.

3 MR. HALL: Did you say 1:00 to 3:00?

4 THE COURT: 1:00 to 3:00.

13:00:38 5 THE CLERK: Well, excuse me, this is
6 Robert.

7 No, Court Connect needed to reschedule so
8 they're going to be coming Friday at 11:00.

9 THE COURT: Well, no one told me that.

13:00:48 10 THE CLERK: Judge, it just happened this
11 morning.

12 THE COURT: Well, so it looks like Friday
13 at 11:00 o'clock, Mr. Hall, the tech people are there, so
14 the courtroom is certainly available.

13:01:03 15 I'm not using the courtroom on Monday.

16 MR. HALL: Okay.

17 THE COURT: So if you want to make an
18 appointment, you should make it with Mr. Pitts.

19 You know, if you've got to have some people
13:01:12 20 in there, you won't be interfering with any court
21 proceeding because I'm not using the courtroom.

22 MR. HALL: Thank you. We may need some
23 time.

24 THE COURT: We are selecting Magistrate
13:01:25 25 Judges for the two vacancies Monday, so I won't be using

1 my courtroom at all.

2 MR. HALL: Okay. Thank you.

3 THE COURT: Okay. Anything -- so, Mr.
4 Pitts, what time -- they are there from 11:00 to 1:00
13:01:40 5 tomorrow?

6 What time are they there?

7 THE CLERK: They are coming Friday at
8 11:00. I'm not sure how long it will last.

9 THE COURT: Okay.

13:01:47 10 THE CLERK: But it shouldn't be more than
11 two, three hours, I wouldn't think, but I can't say how
12 long they will be there.

13 THE COURT: Well, why don't you, just so I
14 have it on the calendar. I'm not using the courtroom so
13:01:59 15 it's not a problem.

16 So looks like that period would make sense
17 for any of the parties if they want their tech people
18 there. The courtroom is open. Tech people are going to
19 be in there.

13:02:10 20 Why don't you people come in on Friday?

21 MR. HALL: We'll make every effort. Right
22 now our tech person may not be there until after 2:00
23 o'clock which is why we might need Monday time but --

24 THE COURT: All right. You should
13:02:26 25 coordinate that with Mr. Pitts just so someone -- you

1 know, we open it up. Normally, I think we keep the
2 courtroom just sort of locked for security.

3 MR. HALL: Understood. Thank you.

4 THE COURT: But we can arrange to have
13:02:36 5 someone there on Monday.

6 Okay. Anything else that anyone can think
7 of?

8 Okay. Stay safe, everyone, and we'll see
9 you all --

13:02:54 10 MR. WEINBERGER: See you on Tuesday.

11 THE COURT: -- Tuesday morning I guess now
12 at --

13 MR. WEINBERGER: 8:30.

14 THE COURT: -- at 8:30.

13:03:03 15 Okay.

16 (Proceedings concluded at 1:03 p.m.)

17 - - - -

18 C E R T I F I C A T E

19 I certify that the foregoing is a correct
20 transcript from the record of proceedings in the
21 above-entitled matter.

22 **/s/Susan Trischan**

23 /S/ Susan Trischan, Official Court Reporter
24 Certified Realtime Reporter
25 7-189 U.S. Court House
801 West Superior Avenue
Cleveland, Ohio 44113
(216) 357-7087